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HOME ALONE: CHILDREN OF INCARCERATED MOTHERS IN NEW YORK CITY UNDER THE ROCKEFELLER DRUG LAWS

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*[T]he harsh mandatory treatment of drug offenders embodied in the 1973 [Rockefeller Drug] legislation has failed to deter drug trafficking or control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the cost of imprisonment would have been better spent on treatment and rehabilitation.*¹

*When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it . . . [W]e should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.*²

I. INTRODUCTION: STILL ILL

New York's Rockefeller Drug Laws—among the harshest in the nation—were enacted in 1973.³ These laws force judges to mete out draconian mandatory minimum sentences to drug offenders, based only on the type and amount of a drug sold or possessed, regardless of mitigating circumstances such as “background, character, role in the offense, threat to society,” or, most significant to this Note, role as single mother/sole provider for minor children.⁴ They also tie the hands of judges who would sentence the more humane and cost-effective remedy of treatment rather than incarceration.⁵

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¹ *People v. Thompson*, 83 N.Y.2d 477, 487 (1994) (Levine, J., dissenting).

² Justice Anthony Kennedy, *The Case for Ending Minimum Mandatory Sentences* (excerpts from an address to the American Bar Association), Aug. 9, 2003, at *Interfaith Impact of New York State, How the Rockefeller Drug Laws Harm Society—Women in Prison and Its Effect on Families [an overview summary January 2004]*, at <http://www.interfaithimpactnys.org/positionpapers/womenprison.htm> (last visited June 29, 2005) [hereinafter *Women in Prison*].

³ See N.Y. Penal Law 220.00 (McKinney 2004); Drug Policy Alliance: Rockefeller Drug Laws, at <http://www.drugpolicy.org/statebystate/newyork/rockefeller/> (last visited June 29, 2005).

⁴ See Drug Policy Alliance: Rockefeller Drug Laws, *supra* note 3.

⁵ See *id.*; Nat'l Institute on Drug Abuse study in David C. Leven, *Our Drug Laws Have Failed – So Where Is the Desperately Needed Meaningful Reform?*, 28 *FORDHAM URB. L.J.* 293 (2000).

In the 1960s, the criminal justice system had been geared to providing treatment for lower-level, non-violent drug offenders, saving more severe sentences for higher-level violators.⁶ But as drug dealers pled guilty to lesser charges, avoiding harsher prison terms, and as the success of alternative treatment programs was considered disappointing, citizens' safety concerns began to rise and their collective patience for rehabilitation began to run out.⁷ In this environment of increased apprehension and decreased compassion, Governor Nelson A. Rockefeller proposed the legislation that became the eponymous drug laws, to combat what he called a "reign of fear," and to reduce drug offenses and drug-related crime in New York.⁸

The severity of the Rockefeller Drug Laws is enhanced by the Second Felony Offender Law, also passed in 1973.⁹ Under this law, a person convicted of a second felony drug offense within ten years of a previous felony conviction faces a drastically increased sentence, even if both offenses are nonviolent, and no matter how much time has passed since the first sentence or what the individual has been doing in the meantime.¹⁰ Because those who plead guilty to a lesser offense on a first drug charge become convicted felons who then face mandatory prison terms for any second offense under the Second Felony Offender Law, some believe this law results in the incarceration of more people than the first offender law.¹¹

The disproportionate impact that these New York laws and mandatory sentencing provisions in other states have on racial and ethnic minorities worsens

According to studies by the National Institute on Drug Abuse, drug treatment is effective in reducing levels of drug abuse, while costing significantly less: at least seven times less than prison for outpatient care and little more than half the cost of incarceration for residential treatment. *Id.* See also Beatty et al., *Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States (2000)*, Center on Juvenile and Criminal Justice, at <http://www.cjcj.org/pubs/poor/pp.html> (last visited June 29, 2005) [hereinafter *Poor Prescription*]. See generally Human Rights Watch, *Collateral Casualties: Children of Incarcerated Drug Offenders in New York* 3-4, Vol. 14, No. 3 (G), June 2002, available at <http://www.hrw.org/reports/2002/usany/USA0602.pdf> (last visited Aug. 8, 2005) [hereinafter Human Rights Watch, *Collateral Casualties*]. "Harsh prison sentences are required for even minor offenses; judges lack the authority to impose alternatives to incarceration such as community-based sanctions or substance abuse treatment." *Id.* Judges are not free to impose sentences lower than those mandated by the statute, no matter how small the offender's role in the crime, or what threat s/he is to society. "For example, for a single sale of \$10 of cocaine, the lowest sentence a court can impose is a term of one to three years. If the offender has a prior conviction—as many drug offenders do—the lowest sentence is a term of four-and-one-half to nine years in prison." *Id.*

⁶ See Lisa R. Nakdai, Note, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 558 (2001) (citing Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & LAW 39-40 (1995)).

⁷ See Nakdai, *supra* note 6, at 557.

⁸ *Id.* (quoting Annual Message from Gov. Nelson Rockefeller to the Legislature of the State of New York (Jan. 3, 1973), in 1973 N.Y. Laws 2309, 2317-18).

⁹ See N.Y. Penal Law 70.06 (McKinney 2004). With these two laws currently in effect in our state, New York has a higher percentage of prisoners incarcerated for drug offenses than any other state. See *Poor Prescription*, *supra* note 5.

¹⁰ See Drug Policy Alliance: Rockefeller Drug Laws, *supra* note 3. See also Nakdai, *supra* note 6, at 559.

¹¹ See Nakdai, *supra* note 6, at 585.

their unfairness.¹² Despite making up only thirty-one percent of the population at large in New York, African-Americans and Latinos constitute ninety-four percent of drug felons in prison.¹³ This disparity in incarceration is not echoed in terms of who is using drugs, however, as evidence shows that whites, constituting sixty-two percent of New Yorkers, buy, sell, and use in equal proportions to their minority neighbors.¹⁴ Ethnic minorities are simply more likely to get arrested, because law enforcement targets street-level drug sales in urban, poor, mostly minority neighborhoods.¹⁵

In New York today, women are the fastest growing portion of convicted drug offenders.¹⁶ One result of the “War on Drugs,” emphasized in our state by the Rockefeller Drug and Second Felony Offender Laws, has been that the number of women in prison in New York State increased by approximately 500 percent from 1977 to 2003.¹⁷ Women often become drug “mules”—low-level narcotics couriers who agree to carry drugs for a fee—when they are trapped in relationships with men in which they have no power and few options. Strategically, women are “[t]he individuals least likely to be suspected as drug couriers . . . particularly women with small children.”¹⁸

Because women who are mules usually have little information about the drug organizations for which they transport, they have nothing of “snitch” value to offer to prosecutors in exchange for reduced sentences, and so, perversely, are routinely sentenced to more time than their trafficking male counterparts who are better able to plea out.¹⁹ Additionally, when women do plead guilty to a lesser charge,

¹² See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 4.

¹³ *Id.* In addition, more than forty percent of the total prison population in the United States as a whole is African-American; countrywide, around ten percent of African-American men in their mid-to-late twenties are incarcerated, and in some cities over fifty percent of young African-American males are supervised by the criminal justice system in one way or another. See *Women in Prison*, *supra* note 2.

¹⁴ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 4.

¹⁵ See Human Rights Watch, *United States—Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2, May 2000, at <http://www.hrw.org/reports/2000/usa/Rcedrg00.htm> (last visited June 29, 2005) [hereinafter Human Rights Watch, *Punishment and Prejudice*]. “Drug control policies bear primary responsibility for the quadrupling of the national prison population since 1980 and a soaring incarceration rate, the highest among western democracies No functioning democracy has ever governed itself with as large a percentage of its adults incarcerated as the United States.” See *id.*; *Poor Prescription*, *supra* note 5.

¹⁶ See Drug Policy Alliance: Women and the War on Drugs, at <http://www.drugpolicy.org/communities/women/> (last visited June 29, 2005).

¹⁷ See Rebecca Tuhus-Dubrow, *Women and Prison*, THE NATION, Mar. 25, 2004, available at <http://www.thenation.com/doc.mhtml?i=20040412&s=tuhusdubrow> (last visited June 29, 2005). See also *Women in Prison*, *supra* note 2.

¹⁸ See Drug Policy Alliance: Women of Color, at <http://www.drugpolicy.org/communities/race/womenofcolor/> (last visited June 29, 2005).

¹⁹ *Id.* Their male counterparts are not only better able to plea out, but are also more willing to do so: “[a] 1997 review of over 60,000 federal drug cases by the Minneapolis Star Tribune shows that men are more likely to sell out their women to get a shorter sentence than vice versa.” See Drug Policy Alliance: Women and the War on Drugs, *supra* note 16. See generally Haneefah A. Jackson, Note, *When Love Is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 518 (2003) (discussing women as dominated by male drug dealers, trapped in the criminal justice system by the conspiracy laws, and then hung out to dry when unable to give prosecutors enough information to receive sentence reductions).

accepting a sentence they have little hope of ameliorating through cooperation with the police and prosecutors, they are often motivated by the needs of their children, willing to take a still harsh, albeit reduced, sentence in order to return home to their families sooner.²⁰

Seventy-five percent of women in New York incarcerated under the Rockefeller Drug Laws are single mothers who are their children's primary caregivers.²¹ Women who are single mothers lose their children to the child welfare system, often permanently.²² Under the Child Protection Act, women irreversibly lose their children when unable to comply with court-ordered plans that usually entail eighteen months of negative drug testing.²³

Tragically, according to a New York State Department of Social Services report, once children go to live with relatives or are placed in foster homes, they face increased chances of being sexually or physically abused.²⁴ Taking sole-provider mothers far away from their children for long periods of incarceration and placing the children in foster homes presents myriad challenges that affect New York City families and communities in ways not easily overcome even long after the prison sentences have ended.²⁵

Having briefly laid out the background and goals of the Rockefeller Drug Laws in the Introduction, this Note, in Part II, will focus on the disproportionately damaging impact of the drug laws on the children of single mothers who are traumatically separated from their main caregivers, and then either taken care of by family members or placed in foster homes. Part III will outline the arguments for and against the laws, discussing whether or not their goals have been met. It will

"Our prisons are filled with poor, undereducated, and vulnerable women, often of African American or Hispanic descent, whose crimes consist of little more than loving the wrong men, succumbing to the fear of abuse and the coercion of domination, or being willfully blind to the activities engaged in by their companions." *Id.*

²⁰ See Nakdai, *supra* note 6, at 557.

²¹ See Tuhus-Dubrow, *supra* note 15. See also *Women in Prison*, *supra* note 2.

²² See *Women in Prison*, *supra* note 2.

²³ See Drug Policy Alliance: Women of Color, *supra* note 16.

²⁴ "Among the most tragic and unintended consequences of the war on drugs are the thousands of orphaned children sent to live with guardians or in foster care, where they are more likely to be the victim of sexual or physical abuse." *Id.* (quoting a report from the New York State Department of Social Services, 1980; Andrew Kendrick, *Fostering Assessment in the Context of Child Sexual Abuse: A Literature Review* (July 1994), at <http://homepages.strath.ac.uk/~zns01101/tayfosas.htm> (last visited June 29, 2005)).

²⁵ See *Women in Prison*, *supra* note 2. This is especially true because, in communities where so many men are imprisoned, "women are often the central providers of financial, social, and emotional resources." *Id.* See also Jackson, *supra* note 19, at 541, n.126 (the author makes a remarkable point about the hypocrisy of the disproportionate impact the War on Drugs has on minorities and on women, The author notes that while scores of women of color are hauled away on conspiracy charges, the wives of our country's current corporate-corruption calumnies are not, when they in fact commit exactly the same sins. These wealthy women are guilty of loving "bad" men, of complicity, or willful blindness to the inevitable source of the large amounts of money their husbands are bringing home and that their lifestyles are entirely dependent upon; just as with many female drug mules convicted and sentenced under mandatory minimum laws.). "This country's out-of-control 'War on Drugs,' and the intolerant punitive mentality that accompanies it, combined with the social and economic biases present in our society play a major role in which women we choose to punish for their husband/boyfriend's actions and why." *Id.*

suggest that a more just and reasoned approach to our society's drug problem is taking sentencing and treatment-versus-incarceration decisions back from prosecutors and returning them to the judges who can more objectively make them, rather than incarcerating so many single mothers and breaking up so many families. Part IV will summarize by concluding that while much more remains to be done in our state, recent developments leave room for some optimism. The "reform" to the Rockefeller Drug Laws passed on the last day of the Legislature's 2004 session, on the 7th of December,²⁶ the victory of Democratic, pro-reform Albany District Attorney David Soares (elected on November 2, 2004), as well as important reform measures taken recently in Arizona, California, and Michigan, all paint a hopeful picture that courageous politicians spurred on by advocacy groups, members of the legal community, and the public as a whole will continue to seek meaningful drug law reform in New York in the future.

II. THE IMPACT OF THE DRUG LAWS ON CHILDREN: BARBARISM BEGINS AT HOME

When a single mother is incarcerated under the Rockefeller Drug Laws and given a mandatory minimum sentence, her child or children are left behind and needlessly suffer severe emotional, developmental, and economic consequences.²⁷ Human Rights Watch estimated in June 2002 that an astounding 23,537 New York children had parents in prison on drug charges, and that fifty percent of incarcerated mothers and fathers are not visited by, and have no personal contact with, their children.²⁸ Furthermore, these children and their families are likely to have grown up in neighborhoods dealing not only with drugs, but with poverty, inadequate access to education, crime, and discrimination, among other social problems. Experts agree that losing a parent to prison places an additional burden on children that can hamper their emotional and social development.²⁹ While some parents who are drug offenders neglect or abuse their children before their forced separation (if they are even around in the first place—many are not), these children can nonetheless lose the only source of love they have.³⁰ Given this, it is not surprising that some mothers who have been sent to prison feel as though their children are punished for their crime as much as they are.³¹

Losing a parent to incarceration means dramatically altered family circumstances for children, especially if that parent was the sole or main

²⁶ See Michael Cooper, *New York State Votes to Reduce Drug Sentences*, N.Y. TIMES, Dec. 8, 2004, at A6.

²⁷ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 2.

²⁸ *Id.* Human Rights Watch compiled data of personal interviews of "a nationally representative sample of state and federal prison inmates, as well as a statistically representative sample of state prisoners in California, New York, and Texas," obtained from, *The Survey of Inmates in State and Federal Correction Facilities, 1997*, conducted by the U.S. Census Bureau for the U.S. Department of Justice's Bureau of Justice Statistics (BJS). See *id.*

²⁹ *Id.*

³⁰ See *id.* "Contrary to prevalent stereotypes, even if a parent is addicted, he or she may nonetheless be a source of love, care, and stability." See *id.*

³¹ *Id.* at 11.

provider.³² According to Human Rights Watch, fifty-one percent of children of sole-provider mothers sent to prison go on to live with their grandparents; twenty-three percent with other relatives; twenty percent with the other parent or stepparent; and eighteen percent are placed in foster homes or agencies through New York's Child Welfare Agency.³³ Once placed within the foster care system, children often move from home to home and are separated from their siblings, adding to their emotional and social trauma.³⁴ While they are in prison, some mothers and fathers have their parental rights terminated by the state, or voluntarily relinquish them so their children can be adopted by other members of their family or foster parents.³⁵

A 2000 Report to Chief Judge of the New York Court of Appeals Judith S. Kaye by the New York State Commission on Drugs and the Courts found that the Administration for Children's Services had open cases for almost five-hundred thousand out of an estimated 1.8 million total New York City children.³⁶ Terminating parental rights of children taken from drug-addicted parents creates a tremendous administrative strain on the family court system, and adds to the drug-related drain on the state's coffers.³⁷ The Report to Chief Judge Kaye estimated that seventy percent of children in the system came from families with drug-abuse problems.³⁸

When the parents of these children are away in prison, maintaining family connection can serve the dual purpose of helping children cope emotionally and developmentally, and increasing the likelihood that families will reunite and reform once the incarceration term is up.³⁹ Unfortunately, the logistical difficulties of staying in touch through prison visits, phone calls, and writing letters often seem insurmountable.⁴⁰ When added to other psychological pressures, such as the anger of children who turn their backs on an absent parent and the shame of both parent and child over the incarceration, some simply give up.⁴¹

³² See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 6.

³³ *Id.* at 6-7. "Almost one in five mothers reported that their children were in a foster home or under control of a child services agency." *See id.*

³⁴ *Id.* at 7. The trauma and the social, economic, and academic instability this entails cruelly leaves children of incarcerated parents more likely to become drug abusers themselves. *See* Jackson, *supra* note 19, at 546, n. 140.

³⁵ *Id.* While the Human Rights Watch report does not cite current statistics on how often incarcerated parents give up or lose rights to their children, there is no doubt that this occurs often even when parents are sent as far upstate as drug offenders are, for sentences as long as those they receive.

³⁶ See Nakdai, *supra* note 6, at 582 (citing N.Y. State Comm'n on Drugs and the Courts, *Confronting the Cycle of Drug Addiction and Recidivism: A Report to Chief Judge Judith S. Kaye*, (2000), available at <http://www.courts.state.ny.us/reports/addictionrecidivism.shtml> (last visited Aug. 11, 2005)).

³⁷ See Nakdai, *supra* note 6, at 582.

³⁸ *Id.*

³⁹ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 7.

⁴⁰ *Id.* at 7-8.

⁴¹ *Id.* at 8. In spite of the paramount importance of family visits, New York children do not visit their parents in upstate prisons frequently: "One-half of incarcerated parents reported that they are never visited." *See id.* at 8.

Perhaps the single greatest obstacle for families seeking to stay in touch during incarceration is distance.⁴² Most of New York's prisons are hundreds of miles upstate, while most of the state's drug offenders are from New York City.⁴³ Foster parents and child welfare workers entrusted with the children's care face significant time and cost burdens in arranging for visits. For example, foster parents may not be able to justify or come up with (or want to come up with) the expense; and child welfare workers may not be able to spare the time in light of the demands of their heavy caseloads, or may blame the absent mothers for the difficulties their children are having.⁴⁴ Even when children are able to visit, the end of each trip brings a new separation. This is particularly hard for younger children who cannot understand why they have to leave again, like "giving a toddler a lollipop and then snatching it away."⁴⁵

The most common way families stay in touch when a parent is sent away to prison is by telephone.⁴⁶ However, according to Human Rights Watch, only fifty percent of mothers and just twenty-five percent of fathers talk to their children by phone at least once a week, and thirty-seven percent of both mothers and fathers never talk on the phone with their children at all.⁴⁷

The tragedy is that visits can have such important positive effects on both parents and children. According to Human Rights Watch, some of these benefits are that visits:

- Allow parents and children to maintain their existing relationship, which may also help the family to reunite upon the parents' release.
- Allow children to express their emotional reactions to the separation, which they may not feel able to do elsewhere.
- Allow parents to work out their feelings about separation and loss, and thereby help them become better able to help their children with the same issues.
- Allay some of the more extreme fears that children may hold about prison conditions, as well as dispel fantasies that they may develop about their parents in their prolonged absence.
- Reduce feelings of abandonment among children, as well as the anger and guilt that tend to accompany such feelings.
- Counteract, by seeing other children and families at prison visiting centers in similar circumstances, some of the alienation that children experience.
- Quell the separation anxiety to which children of incarcerated parents are particularly prone.

Id. (internal citations omitted).

⁴² *See id.* at 8.

⁴³ Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 7. According to Human Rights Watch, "[m]ore than half of incarcerated parents reported in 1997 that their prison was between 100 and 500 miles from their previous residence; almost one-in-five were more than 500 miles away." *See id.* In spite of this, about 800 people assemble in Columbus Circle in New York City every Friday night, and board chartered vans and buses bound for upstate prisons. Ahead of them lie long trips up and back, sandwiched around too-short visits with loved ones. *See id.* at 8-9.

⁴⁴ *See* Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 9. Indeed, "From the child welfare worker's perspective, reunification services are notoriously difficult to provide in situations where the children are in foster care and the mother is in prison at some distance from her children. Social workers in these situations may find it difficult to facilitate visits to the correctional facility Sometimes, the social worker may carry a bias or negative stereotype, blaming the 'convict mother' for problems encountered by her children." *See id.* (quoting Barbara Bloom & David Steinhart, *Why Punish the Children?*, Oakland: National Council on Crime and Delinquency, 1993, p.43).

⁴⁵ *See* Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 9 (internal citations omitted).

⁴⁶ *Id.*

⁴⁷ *Id.*

Although it is sometimes the case that either the parent or the child does not want to talk to the other for emotional reasons such as anger, shame, and depression, more often the families-in-exile are willing, but the inflated cost of making a call stands in the way.⁴⁸ Prisoners are prohibited from taking incoming calls, and can only place outgoing calls via MCI WorldCom—with whom New York has an exclusive contract to provide prison telephone services.⁴⁹ The catch is that these collect calls, requiring operators to connect one station to the other, are the most expensive way of communicating by telephone.⁵⁰ Not only are these calls subject to the highest per-minute rates, the families on the other side of the collect calls—usually low-income families—have to pay a \$3.00 surcharge for each call.⁵¹ Furthermore, there is a thirty-minute limit on each call, so if an inmate wants to continue talking, she or he must reconnect and incur an additional \$3.00 charge to her or his family.⁵² Prisoners are barred from using cheaper collect-call or alternative telephone services like inmate debit account systems, phone cards, or 1-800 numbers, despite the fact that any of these would still meet prison security standards such as stopping calls to unauthorized numbers.⁵³ The per-minute charges and surcharges add up quickly.⁵⁴ Even where there is a desire to speak with incarcerated loved ones on the phone, some families cite telephone bills in the hundreds of dollars as motivation for the painful decision to cut back on this emotional lifeline.⁵⁵

What is the rationale behind these telephone rules? The money collected from these surcharges has nothing to do with costs incurred either by MCI WorldCom or the Department of Correctional Services.⁵⁶ Instead, it generates revenue, only sixty percent of which is returned by MCI WorldCom to the Department of Correctional Services, which then deposits it in a “Family Benefit Fund.”⁵⁷ This fund in turn uses most of the money on services that benefit both current and released inmates, as well as their families, including: medical services,

⁴⁸ *Id.* at 10.

⁴⁹ *Id.*

⁵⁰ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 10.

⁵¹ See *id.* According to Human Rights Watch, this surcharge is more than a non-prisoner would pay for a similar collect call on the outside. For example, a station-to-station call from Ulster County to New York City should cost \$1.80, while the same call from an inmate at the Ulster County’s Eastern Correctional Facility invokes the \$3.00 surcharge. See *id.*

⁵² *Id.*

⁵³ *Id.* According to the National Campaign to Promote Equitable Telephone Charges, there should be no security concerns to using either debit systems or 1-800 numbers since calls made in these ways can be monitored and restricted both in time of call and party called. See National Campaign to Promote Equitable Telephone Charges, at <http://curenational.org/~etc> (last visited June 29, 2005). In contrast, prisoners in the federal system use debit cards to make outgoing calls. See *id.*

⁵⁴ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* According to Human Rights Watch, \$24 million was deposited into the Department of Correctional Services’ Family Benefit Fund in fiscal year 2002-2003. See *id.*

AIDS pharmaceuticals, inmate postage, prisoner television and movies, regular civilian clothing, and buses for family member visits.⁵⁸

The problem is that New York is using a tax assessed on the desperate families of prisoners to subsidize a state program that should be paid for by all taxpayers.⁵⁹ It is the state's responsibility to provide humane living conditions, decent medical care, and an opportunity for rehabilitation to all prisoners.⁶⁰ Because these activities are the state's duty, the cost burden should not fall exclusively on inmates' families.⁶¹ There are lawsuits pending challenging these inflated rates as a "double taxation"—because families pay this tax through the phone surcharge in addition to the state taxes they pay that go to the Department of Correctional Services through the state's budget. In the meantime however, the revenue-generating contract between the department and MCI WorldCom continues to serve as a barrier to inmates' maintaining contact with the outside world, and especially mothers' maintaining contact with their children.⁶²

While some inmates are able to stay in touch via telephone, and some by letters, the psychological trauma of physical, long-term separation is one of the hardest things children of incarcerated mothers have to bear.⁶³ One of the most emotionally scarring elements these children must deal with is the shame that often goes along with losing a parent to the criminal justice system.⁶⁴ Some children's fears may be heightened by derision from peers and classmates.⁶⁵ Others may be influenced by the attitudes of their substitute providers, whether family members or foster parents, many of whom are equally conflicted about what to say to children about absent parents.⁶⁶

Some substitute caregivers say nothing to these children, enveloping missing parents in a shroud of silence, confusing the children who are left behind and denying them a critical emotional and psychological outlet when there is no one with whom to discuss their missing parent.⁶⁷ These children can hold tremendous feelings of anger and guilt inside, feelings which can hamper emotional and social development, bursting forth later at unpredictable times and in unpredictable ways.⁶⁸ Many children become suspicious of other adults, worried they too may

⁵⁸ *Id.*

⁵⁹ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 10.

⁶⁰ *Id.*

⁶¹ *Id.* As the National Campaign to Promote Equitable Telephone Charges puts it: "[w]e don't challenge how the commissions are being spent. We simply believe that all taxpayers benefit from the programs, and all should help to pay for them." See National Campaign to Promote Equitable Telephone Charges, *supra* note 53.

⁶² See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 11.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 11.

⁶⁸ *Id.* According to child experts, other manifestations of the ongoing emotional trauma children of incarcerated parents experience include "learning difficulties at school, aggressive behavior, and involvement in crime." *Id.*

disappear at any time.⁶⁹ Experts believe such children can struggle academically and then fall behind, have behavioral difficulties both in school and out, and ultimately, become more likely than their peers to wind up in the criminal justice system themselves.⁷⁰

When parents come home from prison, they return to children who have grown up—often in difficult, complicated, and angry ways—while they were away.⁷¹ Their children may have developed emotional problems caused by the trauma of having an absent parent; may have formed strong bonds with the other family members or foster parents who have raised them that now seem threatened or jeopardized in complex ways by the reunion with a birth parent; and may be extremely angry about the abandonment they perceive as having been caused by the parent.⁷² Some of these challenges can be overcome with time, patience, and effort, but others cannot, and these families that are unable to recover from the hardship of prison separation may unravel completely.⁷³

These “un-families,” bonded no longer, are the untold stories, the untold results of the harsh mandatory minimum drug sentences still meted out by the laws of the state of New York. When sole provider single mothers are sent eight hours and hundreds of miles away from their families for eight-to-twenty years for selling four ounces or possessing eight ounces of cocaine,⁷⁴ families grow apart and are destroyed; communities, state and child welfare agencies, and loved ones left behind are burdened, and we are all a little less free.⁷⁵

III. PROS V. CONS: WHAT DIFFERENCE DOES IT MAKE?

A. Support for Keeping the Laws

Although criticism has rained down on the draconian sentencing laws and the harsh consequences they have dealt greater and lesser New York drug offenders

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 12.

⁷² See Human Rights Watch, *Collateral Casualties*, *supra* note 5, at 12.

⁷³ *Id.*

⁷⁴ See N.Y. Penal Law 220.43 (McKinney 2004) (making criminal sale of a controlled substance in the first degree a class A-I felony); N.Y. Penal Law 220.21 (McKinney 2004) (making criminal possession of a controlled substance in the first degree a class A-I felony); N.Y. Penal Law 70.00(3) (McKinney 2004) (specific sentencing guidelines set); Leven, *supra* note 5, at 294. See *infra* Part IV, which discusses how the legislature recently amended these provisions, decreasing the maximum time to be sentenced and increasing the minimum amounts needed to qualify for both A-I possession and sale. See also John Caher, *Election Fears Seen Behind Drug Law Shift*, N.Y.L.J., Dec. 9, 2004, at 1. Previously, sale of two ounces or possession of four ounces of cocaine, among other narcotics, constituted an A-I felony that commanded an even harsher sentence of fifteen-to-twenty-five years to life. *Id.*

⁷⁵ At his sentencing hearing in 1918 for espionage for making an anti-war speech, American labor and political leader and five-time Socialist Party candidate for President of the United States Eugene V. Debs famously said “[W]hile there is a soul in prison, I am not free.” See Eugene V. Debs: Labor Hall of Fame, available at <http://library.dol.gov/oasam/programs/laborhall/evd.htm> (last visited June 29, 2005). So too for these families of prisoners.

alike, there are supporters who back the Rockefeller Drug Laws for a variety of reasons.⁷⁶ Some feel the laws serve first to deter those who would offend, and then in the alternative, to keep neighborhoods safe by incapacitating those who do offend for great lengths of time.⁷⁷ Prosecutors point out that fear of long sentences can give incentives to lower-on-the-chain drug dealers to cooperate with authorities, by snitching out higher-ups in exchange for lighter prison terms.⁷⁸

A different benefit argued in favor of the statutory minimums is uniformity in sentencing; forcing sentences to be the same reduces the taint of racial bias in meting out punishment.⁷⁹ Furthermore, knowing that penalties will not vary significantly from one region of the state to another increases the public's confidence in equal treatment from the law.⁸⁰ Another argument proposed in favor of mandatory minimums is that by locking up drug abusers, the laws prevent violent crime from occurring, due to the correlation between the two social dilemmas.⁸¹ A related would-be justification along what seems to be retributive lines is that drug offenders should be punished for the amount of money they cost society in general.⁸²

Additionally, the fact that the harshest of the laws' penalties are so rarely doled out is cited to diminish concern over their severity.⁸³ For example, as has been noted by the media, in the wake of recent "reforms" to the laws, out of a total of approximately 15,600 men and women in jail in New York for drug offenses,

⁷⁶ See Nakdai, *supra* note 6, at 570. As Nakdai discusses in her Note, a report issued by the New York State District Attorneys Association in March 1999 clearly lays out some points that are common to supporters of the Rockefeller Drug Laws. See Gary Spencer, *DAs Fire Back In Debate On Drug Laws*, N.Y.L.J., Mar. 4, 1999, at 1. The drug sentencing laws "serve a critical function in drug infested neighborhoods," according to the report. See *id.* The report offers the following rationales: "[f]irst, the lengthy sentences of imprisonment imposed by the New York drug laws guarantee that defendants are unable to continue their drug activities for a significant period of time Second, the sentences send a clear message that engaging in drug activity has dire consequences." *Id.* Addressing criticism that the drug laws crowd state prisons with non-violent, low-level offenders, the DAs emphasized that seventy percent of incarcerated drug offenders have committed previous felonies. "These figures suggest that the vast majority of drug felons committed to state prison have not just criminal records, but previous felony convictions, and the vast majority of drug felons sentenced to prison are sentenced as a result of these previous felonies, not the New York drug laws," the report noted. See *id.* Robert Gangi, Executive Director of the Correctional Association, a non-profit organization that advocates for fairer prison sentences, poignantly countered that "[n]obody has ever disputed that 70 percent are second-time felons, but that doesn't mean these people are predators. They are addicted to drugs and that is why they keep getting into trouble. Our point is that a less costly response, and a more effective and humane response, is drug treatment." *Id.*

⁷⁷ See Nakdai, *supra* note 6, at 570.

⁷⁸ *Id.*

⁷⁹ *Id.* at 571.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Nakdai, *supra* note 6, at 571. Although the counter to this idea is that treatment has been shown to be the more cost-effective solution. See discussion *infra* Part III.D. See generally discussion *infra* Part III.B.

⁸³ See Nakdai, *supra* note 6, at 571.

only around 400 are serving sentences for the highest A-1 drug felony convictions.⁸⁴

It is true that A-1 felons make up a small proportion of convicted drug felons in New York.⁸⁵ However, there are currently 5,156 prisoners convicted of B-level felonies for possession or sale of smaller amounts of controlled substances in New York, with sentences ranging from four-and-one-half to nine years.⁸⁶ Judges were not able to consider surrounding circumstances or treatment options in any of these mandatory sentences so the severity of the Rockefeller Drug Laws is certainly open to debate.

In general, those in favor of the sentencing laws are motivated by their desire to reduce drug-related violent crimes, and also by the ideal of equal treatment for all within the criminal justice system.⁸⁷ Nonetheless, judicial sentencing discretion and drug treatment alternatives are options that must be considered.

B. Support for Returning Discretion to Judges Instead of Prosecutors

In addition to those who have called for an outright repeal of the Rockefeller Drug and Second Felony Offender Laws, the voices are plentiful that have called for a return of both sentencing and treatment-versus-incarceration decisions to judges.⁸⁸ The way the laws are structured, statutory minimum sentences are based solely on the type and amount of drug involved in the offense, with no allowances for mitigation based on any circumstantial factors having to do with the person's character, involuntary drug addiction, actual level of participation in the wrongdoing, ongoing danger to society, or status as provider for minor children.⁸⁹ Therefore, it is prosecutors and not judges who have all the say in how much jail

⁸⁴ See Cooper, *supra* note 26; Jennifer Gonnerman, *Seven Years on the Sidewalk*, VILLAGE VOICE, Dec. 15-21, 2004, at 46.

⁸⁵ See Cooper, *supra* note 26.

⁸⁶ See Gonnerman, *supra* note 84.

⁸⁷ *Id.* On the other hand, a retired 12-term state senator from Long Island, former Assistant Attorney General under President George H.W. Bush, and former proponent of the laws, John R. Dunne, has a different take on mandatory minimums helping to prevent violence. See John R. Dunne, *Change the Drug Laws*, N.Y.L.J., Apr. 8, 1999, at 2.

Drug law reform is now supported by many governmental, community and religious leaders. However, two objections, both refuted, are still raised. One is that most drug offenders are violent criminals. In fact, of those sentenced to prison for drug offenses in 1997, almost 80 percent had no prior violent felony convictions, and close to 50 percent had never even been arrested for a violent felony. The second objection is that those who go to prison are repeat drug offenders. The truth is that more than 50 percent of drug offenders sentenced to prison in 1997 had no prior drug felony convictions and 33.3 percent did not even have a prior drug felony arrest.

Id.

Senator Dunne chaired the New York State Senate Prison Committee when the Rockefeller Drug Laws were enacted, and later organized the Campaign For Effective Criminal Justice, a bi-partisan organization of leaders in law enforcement, politics, business, and clergy seeking to change New York's drug sentencing laws. See *id.*

⁸⁸ See Nakdai, *supra* note 6, at 572; Dunne, *supra* note 87.

⁸⁹ See Drug Policy Alliance: Rockefeller Drug Laws, *supra* note 3; Dunne, *supra* note 87; Nakdai, *supra* note 6, at 572.

time is apportioned. Prosecutors pick what amount of which drug to charge and determine which column of the books judges will be forced to consult in sentencing offenders.⁹⁰

Yet, prosecutors' choices are neither reviewable, the way those of a trial court judge are on appeal, nor sanctionable, in any way.⁹¹ Prosecutors, no matter how well intentioned, are neither objective nor neutral.⁹² Entrusting them with so much power promotes neither the best interests of justice nor those of the citizens of New York State.⁹³

Returning discretion to judges would allow for consideration of the specific circumstances of each crime and each individual person.⁹⁴ Aside from the fact that there are some cases where triers-of-fact need to be able to take the liberty of those convicted of the most violent crimes by giving out the longest sentences, rendering judges impotent to perform their eponymous function as decision-makers in every case leads to manifestly unjust results when it comes to non-violent, lower-level participants. Allowing judges to decide on sentencing would not lead to racist variances in law enforcement and sentencing in the criminal justice system. Rather, such discretion would result in the justice, dignity and mercy of valid, warranted temperance of the excessive punishment and retribution which lead to the waste of human lives spent behind bars. This is the very reason we ask judges to judge.

In actuality, appellate judges *already have* the authority to overturn harsh mandatory minimum sentences: “[a] reversal or a modification of a judgment, sentence or order must be based upon a determination made: . . . [a]s a matter of discretion in the interest of justice.”⁹⁵ Why then aren't many such “determinations” made “in the interest of justice?”⁹⁶ Traditionally, sentencing decisions are considered factual determinations best made at the trial court level. Appellate judges, even though nominally given the authority under New York Criminal Procedure Law to intermittently temper excessive sentences, in reality rarely do so. One explanation for this is deference to the legislature's considered determination that these statutorily-mandated sentences are the appropriate remedies for our state. Another reason is reluctance in the face of likely reversal from above.⁹⁷

Allowing prosecutors to be the default decision-makers in drug sentencing, and relying on elected state judges to tender only the occasional sentence with mercy—even with a consensus for change growing among New Yorkers—is never going to provide a systematic change regarding who decides how much time is doled out to those convicted of drug violations. This approach will never allow for

⁹⁰ See Drug Policy Alliance: Rockefeller Drug Laws, *supra* note 3.

⁹¹ See Nakdai, *supra* note 6, at 572.

⁹² See Leven, *supra* note 5, at 304.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See N.Y. Crim. Proc. Law 470.15(3)(c) (McKinney 2004).

⁹⁶ *Id.*

⁹⁷ See *Thompson*, 83 N.Y.2d 477. See *infra* note 104 and accompanying text.

consideration of the circumstances needed for the full picture of who should go away and for how long.

Furthermore, there is every reason to believe that if given the discretion to consider such relevant factors as character, drug addiction, level of participation, future threat to society, and family circumstance—including a woman's role as sole provider for her children—judges would choose reduced sentences and alternatives to incarceration.⁹⁸

C. Arguments Against Treatment and Other Alternatives to Incarceration

Although drug treatment as an alternative to incarceration has many proponents in New York, one criticism is that the treatment-over-incarceration decision is invariably a coerced one. The argument is that where an addict does not choose rehabilitation of her or his own free will, but rather as the lesser of evils, treatment is less likely to be effective in solving the underlying problems in the long run.⁹⁹

It is undoubtedly true that not everyone will succeed in treatment programs. However, this is not a convincing reason to prevent judges from sentencing treatment options that continue to be studied and improved upon, when the results of mandatory-sentence incarceration have been so poor—as measured by any standard.

D. Support for Treatment and Other Alternatives to Incarceration

1. A Look at the Numbers

Compared with arrest and imprisonment, “preventive education . . . and treatment” are far more cost effective.¹⁰⁰ A 1994 study by the RAND Drug Policy Research Center (RAND is an acronym for “research and development”) showed the relative cost-effectiveness of treatment, finding a \$7.46 savings in societal costs to taxpayers for every dollar invested in substance-abuse treatment.¹⁰¹ A 1997 RAND study determined that treatment was fifteen times more effective in serious crime reduction than longer prison terms and eight times more effective in reducing drug consumption.¹⁰²

⁹⁸ See, e.g., *Thompson*, 83 N.Y.2d at 487 (Levine, J., dissenting). See discussion *infra* note 104; John Caher, *Kaye Vows to Pursue Reform Even If Forced to Go It Alone*, N.Y.L.J., Jan. 14, 2003, at 1 (col. 3) [hereinafter Caher, *Kaye Vows to Pursue Reform*]. See generally *infra* Part IV.D.1.

⁹⁹ See Nakdai, *supra* note 6, at 584.

¹⁰⁰ See *Women in Prison*, *supra* note 2.

¹⁰¹ See Tuhus-Dubrow, *supra* note 17.

¹⁰² See Nakdai, *supra* note 6, at 584; Leven, *supra* note 5, at 304-305. According to the RAND study, “Mandatory minimum sentences are not justifiable on the basis of cost-effectiveness at reducing cocaine consumption, cocaine expenditures, or drug related-crime. Mandatory minimums reduce cocaine consumption less per million taxpayer dollars spent than does spending the same amount on enforcement under the previous sentencing regime. And either type of incarceration approach reduces drug consumption less than does putting heavy users through treatment programs, per million dollars spent.” See *Poor Prescription*, *supra* note 5 (quoting Jonathan P. Caulkins et al., *Mandatory Minimum*

Currently New York state spends \$32,000 per inmate per year in upstate prisons; in New York City, the amount jumps up to \$68,000, for a total cost of \$860 million per year to run state prisons.¹⁰³ For an interesting comparison, New York has reduced its annual higher education budget by \$615 million since 1988.¹⁰⁴

2. Other Alternatives to Incarceration

One alternative to imprisonment of particular significance to this Note is community correction programs.¹⁰⁵ These are secure facilities allowing non-violent female drug offenders and their small children to live in community-oriented atmospheres where their liberty is restricted for a reasonable term, far less than the sentences they could be given under the Rockefeller Drug Laws.¹⁰⁶ Solutions like community corrections programs deal honestly with the reality that many non-violent abusers are women who are the sole providers for young children, and recognize, correctly, that it is a senseless burden on children, mothers, and society to take kids away and insert them into the child welfare system.¹⁰⁷

Unfortunately, while pilot community corrections programs do exist, there are not enough of them to allow lawmakers to determine whether it is practicable to use them for large numbers of female offenders.¹⁰⁸ More studies are needed to establish that these programs can be a realistic solution. Advocates for families dealing with the loss of a parent to the criminal justice system should use evidence of the success of alternative treatment programs as it becomes available, stressing community correction as a more humane and productive solution for mothers, children, and society as a whole.

Drug Sentences: Throwing Away the Key or the Taxpayers' Money?, RAND Corporation, Santa Monica, CA, 1997).

¹⁰³ See *Women in Prison*, *supra* note 2.

¹⁰⁴ See *Poor Prescription*, *supra* note 5.

Consider in this light the comments of Judge Levine in his dissent in *People v. Thompson*, 83 N.Y.2d 477, 487 (1994):

[T]he harsh mandatory treatment of drug offenders embodied in the 1973 legislation has failed to deter drug trafficking or control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the cost of imprisonment would have been better spent on treatment and rehabilitation.

Id.

In that case, the defendant was a seventeen-year-old girl living with her uncle, the "principal target of [the police] investigation and prosecution," *Id.* at 489 (Bellacosa, J., dissenting), who was caught making one sale of cocaine to an undercover officer. Upon her conviction, the trial court refused to sentence her to the minimum mandatory sentence—fifteen years to life—finding that it would constitute cruel and unusual punishment. After the appellate court affirmed, the Court of Appeals reversed, reasoning that cocaine sales justified severe punishment, and that it was the legislature's job to change the mandatory minimum sentence if it so desired. *Id.* at 488.

¹⁰⁵ See *Jackson*, *supra* note 19, at 547.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Anonymous, *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1921 (1998).

A legitimate question about treatment as an alternative concerns the Drug Treatment Alternative-to-Prison (DTAP) programs that have been established by district attorneys in four New York City boroughs.¹⁰⁹ These programs allow a defendant to be sentenced to drug treatment instead of prison, but only with the consent of the prosecutor.¹¹⁰ While DTAP programs have met with some success, a major drawback is that in order to enter them, defendants must plead guilty to a drug felony, thus exposing themselves to the Second Felony Offender Law should they be convicted of another drug felony within ten years—not an infrequent occurrence.¹¹¹ Ultimately, though, for the 2.1 million Americans in our prisons today¹¹²—including 1.2 million non-violent offenders¹¹³—trapped in vicious cycles of poverty and unequal access to education and health care, entering a treatment program like DTAP may be the only lifeline they will ever be thrown.

A solution is available to the quandary defendants face in deciding between having to plead out to a drug felony to get into a DTAP program on the one hand, and the risk this exposure will subject them to—via the Second Felony Offender Law—should they face conviction for another drug felony in the future on the other. Defendants could be allowed to plea to a misdemeanor instead of a felony. To ease the harshness of completing a rehabilitation but nonetheless still having a felony on one's record, the plea could be made dependent on successful completion of the drug program, so that it would come off the record entirely, or convert to a misdemeanor. These options would incentivize greater participation in DTAP and other drug treatment programs, engendering positive repercussions for non-violent drug offenders, sole-provider mothers, their children, and the communities in which they live.

Finally, a response to the less-than-perfect success rate of treatment programs, is that anything is better than imprisoning non-violent, drug-addicted offenders far from their families for long periods of time, when this strategy has had little efficacy in stopping or even slowing the use and sale of drugs.¹¹⁴ Given the cost-savings demonstrated in studies by the RAND Drug Policy Research

¹⁰⁹ See Spencer, *supra* note 76, at 1.

¹¹⁰ *Id.*

¹¹¹ See Nakdai, *supra* note 6, at 585.

¹¹² See *Women in Prison*, *supra* note 2.

¹¹³ See *Poor Prescription*, *supra* note 5 (quoting Jason Ziedenberg and Vincent Schiraldi, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUSTICE POLICY INSTITUTE, Washington, DC, revised estimates, May, 2000). Not only does the number of imprisoned Americans today dwarf historical rates of incarceration, we are well ahead of the rest of the planet as well: despite having about five percent of the world's population, almost one in four humans incarcerated in the world live in U.S. prisons. See *Poor Prescription*, *supra* note 5.

¹¹⁴ On a nationwide scale, the Center on Juvenile and Criminal Justice found in a 2000 study that "states with *higher* rates of drug incarceration experience *higher*, not lower, rates of drug use." See *Poor Prescription*, *supra* note 5 (emphasis in original). Additionally, although there was a large increase in the number of young people incarcerated in the 1990s, "a recent Center for Disease Control Study found that drug use among high school children increased during the 1990s, with twice as many kids reporting have used cocaine." *Id.*

Center,¹¹⁵ and the ignoble situation New York finds itself in today, with the number of women in prison having grown approximately 500 percent and the number of men about 250 percent from 1997 to 2003,¹¹⁶ even an externally imposed and enforced treatment program is a better choice.

E. Goals Unfulfilled

While Governor Rockefeller's stated goals were to end the "reign of fear" by punishing dangerous drug dealers, reducing trafficking, getting pushers off the street, and deterring drug use, his Drug Laws have failed to fill our state's prisons with the leaders of drug organizations.¹¹⁷ Rather, our prisons house countless non-violent offenders like Elaine Bartlett, a mother of four who served sixteen years out of her twenty-to-life sentence for her first offense of carrying four ounces of cocaine from New York City to Albany in order to make \$2,500, before being granted clemency by Governor George Pataki in 2000.¹¹⁸ When she went to prison, Ms. Bartlett left behind children aged one, two, six and nine, according to the recent book written about her, *Life on the Outside*, by Village Voice author Jennifer Gonnerman.¹¹⁹

Governor Rockefeller's goals have not been fulfilled: New York prisons are filled with lower-level offenders and non-violent drug addicts, who languish in jails instead of receiving the drug treatment they need.¹²⁰ And throughout, drug use and abuse, drug manufacturing and trafficking, remain substantially unsubsidized.¹²¹

IV. A HOPEFUL PICTURE FOR DRUG LAW REFORM IN NEW YORK: THESE THINGS TAKE TIME

A. Arizona

Looking to other states in the nation, Arizona, like New York, traditionally had a background of judicial discretion, then switched to mandatory sentencing laws in 1978, but has since turned back to allowing judges to mitigate as

¹¹⁵ See Tuhus-Dubrow, *supra* note 17; Nakdai, *supra* note 6, at 584; Leven, *supra* note 5, at 304-305.

¹¹⁶ See Tuhus-Dubrow, *supra* note 17.

¹¹⁷ See Nakdai, *supra* note 6, at 557 (quoting Annual Message from Gov. Nelson Rockefeller to the Legislature of the State of New York (Jan. 3, 1973), in 1973 N.Y. Laws 2309, 2317-18); Leven, *supra* note 5, at 293.

¹¹⁸ See Leslie Eaton, *Data Paint a Picture of Longtime Drug Inmates*, N.Y. TIMES, Dec. 23, 2004, at A1. According to Legal Aid Society staff attorney Robert C. Newman, "[t]here are many more Elaine Bartletts in the system than kingpins." *Id.* See also Ellen Yan, *Celebrating Their Milestones*, NEWSDAY, Jan. 19, 2005, at A16 (discussing Lora Tucker, the former interior designer who started a help workshop at the Bedford Hills prison in 1997, and personally lobbied Governor Pataki, writing over 1,500 letters on behalf of Bartlett).

¹¹⁹ See JENNIFER GONNERMAN, *LIFE ON THE OUTSIDE* (Picador/Farrar, Straus and Giroux 2004).

¹²⁰ See Leven, *supra* note 5, at 293.

¹²¹ *Id.*

warranted.¹²² Previously, the sentencing laws allowed for no judicial discretion and required judges to dole out mandatory sentences for drug possession or sale no matter how small the amount involved.¹²³ With the passing of Arizona's Senate Bill 1049 in 1993, the state raised the threshold amount for certain narcotics (excepting marijuana, the only controlled substance that already had a threshold amount of eight pounds for triggering the minimum sentence), meaning that the mandatory sentences are no longer required until the minimum amount is present.¹²⁴

Additionally, in the early 1990s (and then again in 1996 after the Arizona Legislature forced a second vote on the issue), voters in that state passed an initiative called the Drug Medicalization, Prevention, and Control Act, which sent non-violent offenders convicted of drug possession to treatment facilities subsidized by a Drug Treatment and Education Fund instead of prison.¹²⁵ In the first year after this initiative was codified, Arizona taxpayers saved nearly \$2.6 million.¹²⁶

B. California

Inspired by Arizona's success with the Drug Medicalization, Prevention, and Control Act, and similarly concerned about skyrocketing prison populations, California voters passed Proposition 36, which became the Substance Abuse and Crime Prevention Act of 2000.¹²⁷ The Act mandated probation and treatment, and a 1999 estimate by the non-partisan California Legislative Analyst's Office just before the law was passed put the savings to state taxpayers at between \$100 and \$150 million a year.¹²⁸

C. Michigan

Michigan too has returned discretion to judges in reforming some of its mandatory sentences.¹²⁹ In spite of the fact that thirty-six states have statutory mandatory minimums for drug offenses, Michigan, which was one of the first states with such a law, recently lessened the more draconian aspects of its so-called "650

¹²² See Cami Byrd, *Legislative Review: Criminal Code Revision*, 26 ARIZ. ST. L.J. 341 (1994).

¹²³ See Nakdai, *supra* note 6, at 572.

¹²⁴ See Byrd, *supra* note 122, at 346-52; ARIZ. REV. STAT. § 13-3401(36) (West 2004).

¹²⁵ See ARIZ. REV. STAT. § 13-901.01 (West 2004); State ex rel. Romley v. Martin, 205 Ariz. 279, 280 (2003) (under § 13-901.01, "a person convicted for the first or second time of personal possession or use of a controlled substance or drug paraphernalia *may not* be sentenced to a term of imprisonment") (emphasis added) (internal quotations omitted).

¹²⁶ See *Women in Prison*, *supra* note 2.

¹²⁷ See CAL. PENAL CODE § 1210 (Deering 2004); CAL. PENAL CODE § 1210.1(a) (Deering 2004) ("[A]ny person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program.").

¹²⁸ See *Poor Prescription*, *supra* note 5.

¹²⁹ See Nakdai, *supra* note 6, at 573-76.

Lifer” drug law.¹³⁰ The 1978 Michigan law sentenced anyone caught with 650 grams or more of heroin or cocaine to life without parole.¹³¹ After much debate, the law was amended to allow parole for some who have already served fifteen or twenty years as 650-lifers, depending on their prior record.¹³² The changes were specifically aimed at keeping drug kingpins behind bars while favoring parole and treatment for “mules” and addicts, and came years after the admission of then-Governor William G. Milliken, who was Michigan’s chief executive in 1978 and signed the bill into law, that it was a “draconian” mistake.¹³³

D. New York

1. Public Outcry

*“[Mandatory sentences] have not stemmed the drug trade. The only thing they’ve done is to fill the prisons.”*¹³⁴

Calls for reform of the nation’s harshest mandatory sentencing provisions have echoed out in New York from the time of their passage. They have continued up until and through the reforms of December 2004, which shortened the longest ranges, increased the minimums needed to fall under them, and allowed some 400 out of 15,600 drug felons to petition for reduced sentences, in some cases freeing them for time served.¹³⁵

There have been many sources of critique. Scholars have been moved by the burden on those hardest hit by the laws.¹³⁶ Also sounding in over the years have been judges,¹³⁷ politicians,¹³⁸ activists,¹³⁹ Catholic bishops,¹⁴⁰ and hip-hop moguls.¹⁴¹

¹³⁰ See *Poor Prescription*, *supra* note 5; MICH. COMP. LAWS ANN. § 333.7401 (West 2004).

¹³¹ See *Poor Prescription*, *supra* note 5; MICH. COMP. LAWS ANN. § 333.7401 (West 2004).

¹³² *Id.*

¹³³ See Nakdai, *supra* note 6, at 576; Brian M. Thomas, *RECENT LEGISLATION: CRIMINAL PROCEDURE - - Parole Eligibility - Michigan Eliminates Mandatory Drug Sentences and Allows Parole for Possession of 650 or More Grams of Cocaine or Heroin*, 76 U. DET. MERCY L. REV. 679 (1999).

¹³⁴ See *Poor Prescription*, *supra* note 5 (statement of retired Republican New York State Senator John Dunne, commenting on New York State’s mandatory sentences for drug offenses, which he voted in favor of in 1973) (quoting Ellen Perlman, *Terms of Imprisonment*, GOVERNING MAGAZINE, April 2000).

¹³⁵ See Cooper, *supra* note 26; Gonnerman, *supra* note 84.

¹³⁶ “The ‘War on Drugs’ . . . has evolved from what could have originally been deemed a noble attempt at curtailing criminal behavior into what is now little more than a war against the poorest and most defenseless members of society.” See Jackson, *supra* note 17, at 517.

¹³⁷ In a 2003 address at Chancellors Hall in the State Education Building, Court of Appeals Chief Judge Judith Kaye spoke out as she has in the past for drug law reform in New York, which is needed, she said, “to give judges much-needed sentencing discretion . . . as well as to make the Drug Treatment Court option available to an even greater number of nonviolent offenders.” See Caher, *Kaye Vows to Pursue Reform*, *supra* note 96.

Jonathan Lippman, Chief Administrative Judge of all New York State courts, said in 2004: “[r]eform of the Rockefeller Drug Laws has been a priority for the Judiciary for several years . . . The Judiciary remains committed to supporting statutory changes in the law to give judges expanded sentencing discretion in cases involving non-violent drug offenders. We strongly believe that reform is

One particularly poignant call for reform has come from John R. Dunne, the retired 12-term state senator who was a prominent backer of Governor Rockefeller's drug laws while in office in the early 1970s.¹⁴² Senator Dunne now sees the criminal statutes as having been horribly misguided, and has led efforts to change them for several years.¹⁴³ In a recent speech at the Nelson A. Rockefeller Institute for Government, an Albany-based public policy think tank, Senator Dunne said that the former Governor Rockefeller would himself now disavow the drug laws bearing his name.¹⁴⁴ The former governor's brother, Laurence Rockefeller, said as much in a letter last year to *The New York Times*.¹⁴⁵

The public attitude throughout the United States toward mandatory sentencing for drug offenses has changed dramatically over the past several decades. In a recent national survey by the Open Society Institute, "Changing Attitudes Towards the Criminal Justice System," it was noted that sixty-three percent of Americans favor dealing with drug abuse primarily through treatment and counseling rather than incarceration.¹⁴⁶

This is the case in New York as well. In a hearing in Albany on the Rockefeller Drug Laws twenty years after they came into effect, State Corrections Commissioner Thomas A. Coughlin III stated that the public would agree the laws were "totally out of whack" if it knew that the "eight to twenty-five year maximum sentencing range [was the same] for a person who commits a forcible rape as for a

needed to provide more appropriate and effective treatment of these offenders, which not only will save the taxpayers millions of dollars now spent each year on mandatory incarceration but also has proven to reduce recidivism." See Jonathan Lippman, *Restructuring and Reform Mark Judiciary's Agenda*, N.Y.L.J., Jan. 5, 2004, at 7.

¹³⁸ State Senator Thomas K. Duane, the Chelsea Democrat, has pushed for reform in the past, and pledged this fall, before the December 2004 reforms, to continue to do so. "The public outcry for reform became so great that in June of this year the Senate and Assembly called an extremely rare joint conference committee in an attempt to find agreement on reform. Regrettably, there was no agreement reached. However, these developments are movement in the right direction and I will continue to push hard for reform." See State Senator Thomas K. Duane, *Legislative and Community Report* (Fall 2004) (on file with the author).

¹³⁹ Randy Credico, a stand-up comedian and director of the Kunstler Fund for Racial Justice, helped Elaine Bartlett start the organization of inmates' relatives Mothers of the Disappeared, and has fought for seven years for full repeal of the laws in favor of judicial discretion in sentencing. State Senator Thomas Duane gives Credico a lot of credit for the recent changes in the laws. See Gonnerman, *supra* note 82.

¹⁴⁰ See Renee K. Gadoua, *Bishops Urge State to Help Poor*, THE POST-STANDARD (Syracuse, NY), Mar. 7, 2005, at A1; New York State Catholic Conference, at http://www.nyscatholicconference.org/pages/our_agenda/show_issueDetails.asp?id=127 (last visited June 29, 2005).

¹⁴¹ Founder of Def Jam Recordings Russell Simmons organized a rally for reform of the drug laws in the summer of 2003. See Gonnerman, *supra* note 84.

¹⁴² See John Caher, *Backer of Changes in Rockefeller Drug Law Says Judges Should Get Off the Sidelines*, N.Y.L.J., Oct. 7, 2004, at 1 [hereinafter Caher, *Backer of Changes*].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Drug Policy Alliance: Treatment vs. Incarceration, available at <http://www.drugpolicy.org/reducingharm/treatmentvs/> (last visited June 29, 2005).

person who sells a dollar's worth of cocaine."¹⁴⁷ While some of the sentences have been adjusted downward with the recent changes to the laws, the Commissioner's point on proportionality still stands.

Polls taken over the past several years also show that New Yorkers have been coming around to meaningful reform. In a survey conducted for the New York Law Journal by the Quinnipiac College Polling Institute from March 17-21, 1999, more than two-thirds of those surveyed preferred that judges be allowed to decide drug sentences on a case-by-case basis, rather than the statutorily mandated minimums.¹⁴⁸ Additionally, eighty-five percent of respondents said they favored required drug treatment for someone convicted just once of using drugs.¹⁴⁹

One traditional concern of politicians who might otherwise be sympathetic to drug law reform is being labeled "soft on crime" by political opponents, and ultimately the public. However, a Zogby International Poll conducted from April 26-28, 1999, found that sixty-four percent of people do not consider a politician who is for reform to be "soft on drugs."¹⁵⁰

2. Case in Point: Newly Elected, Pro-Reform Albany District Attorney David Soares

In a recent political campaign in New York, David Soares, a relatively inexperienced, thirty-four-year-old African-American lawyer running on an anti-Rockefeller Drug Laws platform, became Albany County's first black district attorney on January 1, 2005, surprising both Democratic incumbent Paul A. Clyne, in the primary, and then Republican Roger Cusick in the general election.¹⁵¹ Mr. Soares garnered sixty-five percent of the vote, and in so doing, became the only district attorney in state history to win with a campaign based primarily on

¹⁴⁷ See Nakdai, *supra* note 6, at 563 (quoting *Rockefeller Drug Laws—20 Years Later: Hearing Before the Assem. Comm. on Codes*, 1993 Leg., 216th Sess. (N.Y. 1993) (testimony of Thomas A. Coughlin III, State Corrections Commissioner, available at <http://druglibrary.org/schaffer/misc/coughlin.htm>)) (last visited June 29, 2005).

For more on how badly the Rockefeller Drug Laws have fared under the proportionality rule, see Second Circuit Judge James L. Oakes's dissent in *Carmona v. Ward*, 576 F.2d 405, 423 (2d Cir. 1978):

It is difficult to believe that the possession of an ounce of cocaine or a \$20 "street sale" is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury. Yet these crimes are punished less severely by the sovereign State of New York than the drug offenses in these cases.

Id.

¹⁴⁸ See *Survey Finds Support For Drug Law Reform; Judicial Discretion Favored in Sentencing*, N.Y.L.J., Mar. 29, 1999, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ See Drug Policy Alliance: Results for Zogby International Poll (New York), Apr. 28, 1999, at <http://www.drugpolicy.org/library/publicopinio/zogby.cfm> (last visited June 29, 2005); Leven, *supra* note 5, at 306.

¹⁵¹ See Daniel Wise, Andrew Harris and John Caher, *Democrats Upset the Norm in Suburban Judicial Races; Republicans Defeated in Nassau, Lose Seats in the Ninth District*, N.Y.L.J., Nov. 4, 2004, at 1.

reforming New York drug laws.¹⁵² He won despite the fact that his fellow Democrat and former boss Clyne decided—after being defeated in the primary and just before the general election—to back the Republican Cusick, calling Mr. Soares “a menace to the public safety.”¹⁵³

Mr. Soares has spoken of plans to get around the severity of the Rockefeller Drug Laws by allowing offenders to plead guilty prior to their indictment.¹⁵⁴ Despite having never before tried a felony or argued an appeal, Mr. Soares has said he plans on prosecuting some cases and arguing some appeals himself.¹⁵⁵ Mr. Soares’ victory was called “[t]he most important race in New York State” by Brian Lehrer, prominent radio host at WNYC.¹⁵⁶ According to Ethan Nadelmann, executive director of the Drug Policy Alliance, the surprise primary and general election trounces show a turning of the tide in favor of reform.¹⁵⁷ Former Senator Dunne also forecast a change in New York political dynamics that bodes well for further change.¹⁵⁸ Assembly Speaker Sheldon Silver credited the support of the Working Families Party and the “changed political landscape” that Mr. Soares’ election helped herald in with recent reforms in the mandatory sentencing laws.¹⁵⁹ Discussion of Mr. Soares’ ascendance continues in the media, especially in light of these amendments, which were signed into law on December 7, 2004.

3. A Softening as “Reform”

After almost ten years of failed attempts, state lawmakers voted to reduce the mandatory sentences for some drug offenses on December 7, 2004, and Governor George Pataki signed the changes into law shortly thereafter.¹⁶⁰ Changes include reducing the sentences from the previous 15-20 years to life to 8-20 years, and increasing the amounts needed to qualify for the severest A-1 felonies, from four to eight ounces.¹⁶¹ The minimum sale amounts were not changed and remain at two ounces.¹⁶² The Class B felonies for which far greater numbers of people are serving sentences, however, either stayed the same or were increased.¹⁶³

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Drug Policy Alliance: Democrat David Soares Completes Stunning Upset in “New York State’s Most Important Election,” Nov. 3, 2004, at <http://www.drugpolicy.org/news/pressroom/pressrelease/pr110304.cfm> (last visited June 29, 2005).

¹⁵⁷ “Soares’ victor[ies] . . . prove[] that a political candidate can run and win on a platform that emphasizes sensible drug law reform The drug war bandwagon has run out of gas in New York. Political momentum now clearly favors reform.” *Id.*

¹⁵⁸ According to Dunne, “[t]his is ‘Exhibit A’ in how attitudes have changed It seems the people are ahead of their elected officials.” See Caher, *Backer of Changes*, *supra* note 142.

¹⁵⁹ See Cooper, *supra* note 26.

¹⁶⁰ *Id.*

¹⁶¹ See Maura Yates, *Strict Rockefeller Narcotics Laws Abated by Pataki*, THE NEW YORK SUN, Dec. 15, 2004, at 3; See also Cooper, *supra* note 26.

¹⁶² See Yates, *supra* note 161, at 3; Cooper, *supra* note 26.

¹⁶³ See Cooper, *supra* note 26.

More than 400 New Yorkers currently serving time for A-1 felonies can petition judges for early release based on time served.¹⁶⁴ Another change in the law is that now, in addition to the one-sixth reduction in total sentence that prisoners could receive previously for good behavior, they are eligible for an additional one-sixth decrease for earning their general equivalency diploma or for attending a drug-treatment program in prison, which would assist with a smoother return to society upon release.¹⁶⁵

Nonetheless, some were not as happy as others with the new changes. State Senator Thomas Duane, a Democrat from Chelsea, was exasperated during the floor debate on the so-called “reforms.”¹⁶⁶ So was Robert Gangi, executive director of the Correctional Association of New York, a non-profit organization advocating for fair sentencing, who called the laws “virtually as harsh as ever.”¹⁶⁷

Marsha Weissman, executive director of the Center for Community Alternatives in Syracuse, called recent reform only the first step.¹⁶⁸ Ms. Weissman advocates a two-pronged approach, including further Rockefeller Drug Law reform to promote treatment instead of prison, as well as the restoration of voting rights as a way to encourage stable, productive returns to society for inmates.¹⁶⁹

Mallory Greitzer, a sixteen-year-old Brighton High School student and member of the Teen Council, was among those placing quotes around the word “reform” in describing the recent changes.¹⁷⁰ Writing in the Rochester Democrat and Chronicle, she noted that the laws as rewritten do not provide any additional funding for drug treatment programs, nor do they do away with the mandatory minimum sentences that disregard the specific circumstances of any given case.¹⁷¹ Ms. Greitzer poignantly questioned the wisdom of society’s continued assessment of drug addiction as a criminal offense: “[n]o one wants to be an addict—and once you’re addicted, the threat of incarceration sure isn’t going to stop you.”¹⁷²

V. CONCLUSION: HOW SOON IS NOW?

This author is not the first to suggest that the Rockefeller Drug and Second Felony Offender Laws are an unjust, unmitigated failure on the part of the state government and criminal justice system. They tie the hands of neutral and objective judges, and dole out sentences based only on amount and type of drug,

¹⁶⁴ *Id.*

¹⁶⁵ See Yates, *supra* note 161, at 3.

¹⁶⁶ See Cooper, *supra* note 26. “This is it? After all the time, this is what comes to the floor? It would be an unbelievable stretch to call this Rockefeller drug reform.” *Id.*

¹⁶⁷ See Leslie Eaton & Al Baker, *Changes Made To Drug Laws Don’t Satisfy Advocates*, N.Y. TIMES, Dec. 9, 2004, at B1.

¹⁶⁸ See Marsha Weissman, *Restoring Ex-Felons’ Vote Anchors Society to Justice*, POST-STANDARD (New York), Feb. 15, 2005, at A9.

¹⁶⁹ *Id.*

¹⁷⁰ See Mallory Greitzer, *Drug Addicts Need Help, Not Incarceration*, ROCHESTER DEMOCRAT & CHRONICLE, Mar. 3, 2005, at 10A.

¹⁷¹ *Id.*

¹⁷² *Id.*

with no correlation whatsoever to character, circumstances, culpability, continued danger to society, or family circumstances. All the wrong people are behind bars,¹⁷³ and the real problems of drug addiction and crime, are left unrectified and virtually unaddressed. These laws remove far too many people from New York City to upstate New York, including, most tragically, mothers who are the only caregivers for their children. They rip untold families asunder, never to be reformed.

While a few mothers may have their sentences commuted as Elaine Bartlett did, most are not so lucky. Judges must have the option of ordering treatment centers and community correction programs, alternative sentencing structures that deal honestly with the real equation here: the harms done to families and neighborhoods by sending mothers to upstate prisons for making poor decisions from among bad choices greatly outweigh any possible gains from their incarceration. Studies have shown how effective drug treatment options for non-violent offenders can be at 1) salvaging the lives of our fellow citizens; and 2) saving money currently spent on prisons and incarceration, thereby diverting it to other sorely needing areas.¹⁷⁴

Proponents of mandatory sentencing proffer reductions in violent crime—whose materializations are debatable at best—and uniformly meted out sentences stripped of the taint of racial discrimination.¹⁷⁵ But violent crime continues in New York, while politically weak constituencies are decimated by missing adults, whose lives are ruined along with the lives of their families. Unacknowledged lives are destroyed by mistakes made, by opportunities not offered, and by illnesses unrecognized and untreated. And consistent sentences mean nothing when those sentences are consistently too great.

Locking up single mothers who serve as drug couriers will not diminish violent crime in New York. Treating them the same in the eyes of the law as drug kingpins or anyone else carrying the same amount of the same controlled substance accomplishes absolutely nothing. Distinguishing between violent or repeat offenders, and first-time, non-violent ones is the kind of decision our society has already left to judges.

Recent amendments to the law are not even the tip of the iceberg.¹⁷⁶ While there is an abstract good to come from focusing greater media and public attention on the issue, the December 2004 changes still leave sentencing decisions not with our judges, but in the hands of the prosecutors who decide which of the felony

¹⁷³ The late rapper Tupac Shakur noted succinctly in regard to our nation as a whole what is even more true about our state today: “penitentiary’s packed, and it’s filled with blacks.” See Tupac Shakur, “Changes,” from *Greatest Hits*, © 1998 Death Row Records/Interscope Records. The “War on Drugs” affects ethnic-minorities disproportionately in ways that cripple our entire society and that we cannot afford to ignore.

¹⁷⁴ See *supra* Part III.D.

¹⁷⁵ See *supra* Part III.A.

¹⁷⁶ See *supra* Part IV.D.

classes they have enough evidence to charge a given defendant under.¹⁷⁷ They leave broken drug statutes that send non-violent, first-offense mothers too far away from their children to have any hope of maintaining an ongoing relationship.¹⁷⁸

While the tremendous increase in our prison population and its disparate effect on minority communities are undeniable, and while the effects of losing a parent to prison reverberate through children and from generation to generation, there is some cause for hope. States such as Arizona, California, and Michigan have taken steps back from the edge in recent years, moving away from compulsory sentences that even unwilling judges have no choice but to mete out, and back toward judicial discretion and mandatory drug treatment options.¹⁷⁹ In Albany, citizens of that county elected a district attorney who defeated an incumbent Democrat in the primary and then the Republican challenger in the general election running on a one-issue drug-law-reform campaign in November 2004.¹⁸⁰ The New York State Legislature finally enacted extremely modest reform in December 2004.¹⁸¹ With all of these current events in mind, and with signs of the pendulum's swinging back from mandatory minimum sentences toward discretion and treatment, repeal of New York's Rockefeller Drug Laws, still among the harshest in the nation, should not be too far away.

¹⁷⁷ See *supra* Part III.B.

¹⁷⁸ See *supra* Part II.

¹⁷⁹ See *supra* Part IV.A-C.

¹⁸⁰ See *supra* Part IV.D.

¹⁸¹ *Id.*

